No. 14328

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BETTY GULLEY,

APPELLANT,

vs.

MARY JANE GULLEY, Also Known as Mary J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA,

APPELLEES.

Upon Appeal from the District Court of the United States for the District of Nevada.

OPENING BRIEF FOR APPELLANT

ROBERT RICHARD GILL,
Ely, Nevada
Attorney for Appellant

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STATEMENT OF FACTS

This is an appeal from a judgment or judgments, (there being in the Transcript of Record both a Judgment Entry in Civil Docket entered December 16, 1953, and a formal Judgment entered January 29, 1954, Tr. 24, 25-6) entered by the Honorable Roger T. Foley, District Judge for the District of Nevada, sitting without a jury, in a civil action brought by Betty Gulley, appellant herein (Tr. 3-6) to recover under a

certificate of National Service Life Insurance in the sum of $10,000 issued to her deceased son Wallace Phillip Gulley wherein she was named as the sole beneficiary. (Plaintiff's Exhibit 2, Tr. 41-42).

Mary Jane Gulley, then the widow of the decedent, and the United States of America were named defendants, she having made claim to the Veterans Administration for the proceeds of the said insurance which had been rejected by the said Veterans Administration (Tr. 5) but which had been decided in her favor by the Board of Veterans Appeals (Tr. 5, 9). A disagreement thus existed between plaintiff, appellant herein and the said Veterans Administration as to the payment of such insurance according to the terms of the certificate. Jurisdiction was conferred upon the District Court of the United States for the District of Nevada by §445 and 817, Title 38, U.S.C.A. That court having heard and determined the case adverse to plaintiff's contentions, she has the right of appeal to this Court from such determination, and has so appealed. The actual appellee therein is Mary Jane Gulley, a defendant below, whose name has been changed to Mary Jane Wauson by remarriage. (Tr. 55). The United States of America, named also as an appellee, is a mere stakeholder.

THE PLEADINGS

Those pertinent here are the complaint filed May 26, 1950 (Tr. 3-6), and the answer of the then defendant Mary Jane Gulley filed October 17, 1950. A pre-trial conference was had June 22, 1951 and the Order on Pre-Trial Conference appears in the record. (Tr. 10-12).

STATEMENT OF THE CASE

The main question involved is whether there was sufficient evidence to support the trial court's decision, set forth as its Conclusions of Law No. 1 (Tr. 22).

"That on February 5, 1947, said Wallace Phillip Gulley

took affirmative action evidencing an exercise of his right to change beneficiary by filing on said date, with Headquarters Squadron, United States Marine Corps Air Station, El Toro (Santa Ana), California, his 'Confidential Statement' containing among other matters the following: (Emphasis supplied)

"'11. I hold the following insurance policies:

(1) (Company): NSL. (Amount): 10,000. Beneficiary: Mrs. Wallace P. Gulley.'"

SPECIFICATION OF ERRORS

1. The trial court unduly limited the cross-examination of the defendant Mary Jane Wauson in the following respects:

(a) By sustaining objection to question asked the defendant as to what became of a damage suit she had instituded against the person who ran into her husband, causing his death. She had testified on direct: (Tr. 65)

> "Q. That was on the 13th of October you said that we were at the Base. A. It was.
>
> Q. 1947? A. Yes.
>
> Q. And at that time we were investigating facts in connection with the litigation you were trying to prosecute in connection with your husband's death against the party who ran into your husband?
>
> A. Yes."

And on cross-examination by the writer hereof:

> "Q. You said you went to El Toro looking for records in connection with a damage suit you had. What became of that damage suit?
>
> Mr. Custer: That is objected to, your Honor, as wholly immaterial.
>
> Mr. Gill: She brought it in.
>
> The Court: Objection sustained. We are not

interested in that damage suit.

Mr. Gill: We had something on that. If the Court's ruling stands, I can't ask any more questions.

The Court: What do you mean by that?

Mr. Gill: We intend to bring out that she asked her husband's mother and father to be present and when the trial came on she herself didn't show up.

The Court: I don't see what that has to do with the case. The ruling will stand. Objection sustained."

We were then prepared to present in rebuttal the testimony of the plaintiff if the defendant had answered the question contrary to her statement of what happened in court when the trial of that damage action came on. The defendant had a tendency to vary her testimony on cross-examination from that given on direct, and since she had mentioned that damage action, we believe we were entitled to develop her version of the outcome.

(b) In sustaining objections to questions asked the witness Virginia Barbee — a sister of the decedent — on rebuttal as to whether she recalled anything the decedent had said regarding to his family life, or his desire for a home. (Tr. 77-78). The objection being that the first question called for pure hearsay. That was true, but very much of the defendant's testimony on direct had been pure hearsay, as what her husband had told her on various occasions. (Tr. 59-60 for example.) She also testified on direct: (Tr. 71)

"Q. Mrs. Wauson, Mrs. Barbee gave testimony on the stand this morning that there had been some trouble between yourself and your husband. Is that true?

"A. No. We were very happy.

"Q. Up to the time of his death?

"A. That is correct."

We believe we should have been allowed to show by the

witness Mrs. Barbee that on the last occasion when she saw her brother alive, on or about Mother's Day of 1947, some three months before his untimely death at an age of three months short of twenty-three and less than a year after the marriage, he had mentioned matters upon which he and his wife disagreed.

If permitted she would have testified that he said, in response to a question by her if he had the insurance changed to Mary, that he was not having the insurance changed. He didn't think Mary and he would be able to get along, didn't think things were going as well as they should. She had refused to give up the room and start housekeeping. He would never change it now, but if happily married and had a family he would change the insurance. (Cf. her testimony on direct received without objection or cross-examination, Tr. 37:)

> "A. My brother told me he was having trouble with his wife and did not change his insurance; he had left it the way he had previously made it to my mother, without any contingent."

SUMMARY OF ARGUMENT

Evidence Insufficient to Sustain Decision.

There was no testimony to support allegation in answer that the insured delivered or caused to be delivered to proper officials a written form to change beneficiary from mother to wife, on or prior to February 5, 1947. Date that of confidential statement Defendant's Exhibit A. No actual evidence of when statement filed at Headquarters office. Language of allegation did not refer to confidential statement as that alleged in next paragraph. Only other reference to a form for change in letter from defendant (Exhibit C). Only testimony on subject hers on cross-examination, evasive. No finding that such a document might have been forwarded but lost. Confidential statement only writing before trial court. Baker deposition discussed compared with plaintiff's evidence as to Baker.

Analogy between comment by Court in Cohn v. Cohn and Baker deposition. List of cases cited supporting point that evidence did not justify decision below. Trial Court evidently following dissenting opinion in Bradley case but even that not full support. Exact nature of confidential personal report in Bradley case was unknown. Quotation from Kendig v. U. S. on that subject. In Bradley case a form required of all flying officers, with Army Air Force circular set out as footnote. Decedent here not a flying officer. No information as to just what the confidential form in Kendig case was but implication only to be opened on death of maker. No such implication in Bradley v. U. S. Bradley case never overruled in own circuit.

Shapiro v. U. S. one of numerous wrong form cases. Said to be held unanimously to be affirmative act and effective. Coleman v. U. S. suggested as an exception to that statement.

Gann v. Meek now discredited. Dissenting opinion of Judge Sibley in that case mentioned with approval in Kell v. United States.

Reference to later cases in 38 U.S.C.A. mainly district court cases without any great showing of careful reasoning. A notable exception Kell v. United States, affirmed in appeal. Quotations from district court opinion.

Ford v. United States, a district court case analyzed. Comment of Court upon a witness's testimony suggests the Baker deposition here. Judgment for last beneficiary of record.

Burden of proof upon claimant. Written instrument, even personal letter from insured to claimant should carry more weight than oral testimony of statements by him. Comment in annotation in ALR 2d on this class of evidence, weakest known to writer.

Oral testimony of defendant vulnerable to this criticism. Quotations therefrom. Coincidence of month of June, 1947 in her testimony and the Baker deposition. If husband told

her in January of intention to change beneficiary, why had she forgotten it by June? A woman of business training and experience, her feminine curiosity should have led her to follow up his statement.

Baker's recollection of making confidential statement by decedent at time of making deposition rather vague. Why did he not mention it to her on bus trip? When did she learn of his supposed knowledge if not on that trip?

Courts not uniform in holding as to weight to be given letters. Littlefield v. Littlefield on subject.

Watson v. United States — statement of witness that she prepared form of application for change of beneficiary, saw it signed and mailed to Veteran's Administration held insufficient to support burden of proof of such change.

Ramsay v. United States closely akin to instant case on point of facts. Quotation from annotation in 2 ALR 2d. Findings here show oral statements of insured not in accord with defendant's testimony of what he said to her.

Conclusions below not sustained by evidence. Judgments entered pursuant thereto erroneous and should be reversed.

ARGUMENT

The Evidence in Behalf of Defendant Was Insufficient to Sustain the Decision.

1. Conspicuously lacking was *any* testimony to support the allegation made in her Answer, by her attorneys for her, that is in paragraph 3 (Tr. 8) of her further, etc. defense

> ". . . . upon information and belief that the said Wallace Phillip Gulley delivered or caused to be delivered to the proper officials a written form to change the beneficiary of his National Service Life Insurance policy from that of his Mother, Betty Gulley, to his wife, Mary Jane Gulley, this defendant; and that said form was delivered on or prior to February 5, 1947."

That date is that of the confidential statement, Defend-

ant's Exhibit A (Tr. 61). Finding No. 9 (Tr. 20), i.e., that this statement was filed on that date in the office of the Headquarters Squadron is not supported by any evidence. The sealed envelope in which Mrs. Wauson testified it was found was never produced, showing filing date if any, and there were no filing marks on the document itself.

Counsel in the quotation above were not referring to this statement as the "written form to change the beneficiary" as they alleged its filling out and signing — but as will be noted *not* its filing — in the next paragraph of their answer, i.e., No. 4. The only other reference in the record to a form for changing the beneficiary of the decedent's insurance is in a letter written by this defendant to the Veteran's Administration (Defendant's Exhibit C, Tr. 67) and that an extremely nebulous one:

> "I do not understand why a regular form did not reach the proper office."

Not a statement that such a form had been prepared and forwarded, nor even that her husband had told her he had done so. Whence, we would inquire, counsel's "information and belief," supra? Her letter was dated October 13, 1947, the day she says the confidential statement was found in the records at the Base. It refers to a letter from the Veterans Administration of September 30, 1947, which counsel did not read into the record, although they were using the government's file at the time, (Tr. 65, last line), and the writer hereof did not have access to it. The only testimony relative to a form requesting change of beneficiary is hers on cross-examination by the writer: (Tr. 75)

> "Q. Did you ever see a form requesting change of beneficiary signed by your husband?
>
> "A. No, I don't think I did."

This answer, we submit, was evasive, and should have been a simple negative. She was not a simple housewife, but a woman of business experience, a bank bookkeeper and teller,

for a good many years (Tr. 64). If she had seen a form of such vital importance she would have remembered it. She did not see it, in our opinion, because it never existed. The trial court made no finding nor implied finding that such a document might have been made and forwarded but lost. Therefore its decision must have been based on the theory that the confidential statement in itself constituted a change of beneficiary. The Courts have uniformly held that there must be a writing, and this was the only writing before it. The testimony of the defendant and the deposition of the witness Neil D. Baker (Tr. 49) as to what the decedent had told them would be insufficient to show that there had been a change of beneficiary.

It will be noted that Baker said that the conversation with Wally took place in June of 1947, and that he himself brought up the topic. Cf. the testimony of the witnesses Guy William Gulley and Virginia Barbee as to what their brother told them in the previous month. (Tr. 32 and 37). Cf. also the testimony that Wallace Phillip Gulley had never mentioned Baker to his mother (Tr. 77); that he was selected by the defendant as the escort for her husband's body to Nevada (Tr. 48); and that she returned the evening of the day of the funeral on the same bus with Baker; together with the fact that he was not named by the decedent under paragraph 9 of the confidential statement as one of the persons to assist in inventorying his effects, etc. The writer wonders why he should have evinced such an interest in Wallace's personal affairs.

It recalls the Court's comment in Cohn v. Cohn (CCA Dist. Col.), 171 F2d 828, headnotes 2-3:

> "Moreover, we are impressed by the insistent part played by the key witness for appellee Cohn in this matter. He testified 'I had often talked to Herbie (Cohn) about changing his insurance'; 'I told Herbie if he was going to change it now would be a darned good time for him to do it; and I got the blanks and

gave him one and I kept one.' Again, this witness testified that upon one occasion when Cohn, late for a flight, handed him a 'confidential sheet' (indicating the desired disposition of his effects) 'and asked me to put it in the envelope, which I did, he' (the witness) 'checked the sheet to see if he had signed it,' and 'It named Helene Cohn as the beneficiary for all purposes.' All these circumstances create an atmosphere which illustrates the necessity that any change in the formally designated beneficiaries of these policies be evidenced by some unmistakable proof that the decedent did make the change, the reasonable and in our view, necessary proof is a writing, which if not currently existing, should be proved by the well-established rules for making such proof."

In that case, as in this, no written evidence of change of beneficiary was produced. Judgment for wife in the court below reversed, with directions. Substituting Neil D. Baker for the unnamed witness in the Cohn case, much of the excerpt above might have been written with the instant case in mind. Baker was defendant's key witness, and played a very insistent part: (Tr. 49)

> "A. * * * the subject of insurance was brought up, I believe I brought it up, and asked Wally if he had had his insurance changed, and he said, 'Yes,' that he had had his insurance changed to his wife's name."

> "A. Well, I asked him about his insurance, we brought that up some way, I don't know just how it came up but I had asked him if he had his insurance changed over to his wife's name, as I said before." (Tr. 50)

> "A. Well, we were just sitting around in our quarters at the Staff NCO Club and I brought the subject up about insurance, naturally I meant Service Insurance, and I had asked Wally if he had had his insurance changed over to his wife's name, and Wally said yes, he had the insurance changed over to his wife's name, Mary Gulley." (Tr. 54)

To this point that the evidence did not justify the decision that there had been a change of beneficiary, in addition to the District Court case of *Cohn v. Cohn,* supra, we cite the following authorities; among others:

Bradley v. United States (CCA 10), 143 F2d 573;

Butler v. Butler (CCA 5), 177 F2d 472;

Coleman v. United States (CCA Dist. Col.), 171 F2d 829;

Ramsay v. United States (DC Fla.), 72 F. Supp. 613;

Kendig v. Kendig (CCA 9), 170 F2d 750;

Ford v. United States (DC ED Tenn.) 94 F. Supp. 223;

Kell v. United States (DC WD La.), 699, affirmed 202 F2nd 143;

Watson v. United States (CCA 5), 185 F 2nd 292.

The court below appears to have followed the minority or dissenting opinion in the Bradley case. Even that does not fully support the decision. (Tr. 14). Exactly what the "confidential personal report" therein mentioned may have been does not anywhere appear. Judge Foley says that it was executed by the insured and filed with the Headquarters of the 57th Pursuit Group, etc. The opinion of Judge Muragh (Tr. 14) refers to it as having been executed by the insured, addressed to and filed with his group headquarters. This Court in the *Kendig* case, supra, said at page 751 of 170 F2d:

> "In Bradley v. United States, 10 Cir. 143 F2d 573, a confidential statement of *this type* (i.e. of the type in the Kendig case) "was held by a divided court to be insufficient evidence of a change of beneficiary. However, the court considered the statement only from the standpoint of its representing in and of itself an attempt to effect the change. Here, as already noted, there was a testimony of the insured's having told his brother that he had sent in a form changing the beneficiary. The confidential statement tends at least to substantiate this declaration. It is

not inconceivable that such a form was actually sent but became lost or misplaced in the files of administration." (Emphasis supplied)

A confidential statement of what type? Nowhere in the published opinions is its language set out. In the Bradley case opinion on page 574 it is referred to as a " 'confidential personal report' required of all flying officers," etc., and the Army Air Force Circular establishing a file of such reports is set out in full as Footnote 1 to that page. Where was there any evidence that the confidential statement under consideration here *was required* of anyone? There is no evidence that the decedent Wallace Phillip Gulley was a flyer, and obviously he was not an officer in the sense the word is used above. The filing may have been optional.

Just what the form in the Kendig case was we are not informed, but the reference in the opinion to Kendig's having been aware "of the inexorable circumstances under which, only, the document would be opened and read" is an implication that it would be opened only on the death of the maker. There is no such inpplication as to the form in the Bradley case. It apparently became an official record forthwith.

Bradley v. U. S. has been distinguished by various courts, but never overruled to our knowledge in its own Circuit. Even the majority opinion is cited in support of decisions both ways, that is, akin to appellant's contention here, or to that of the appellee.

The trial court here in its opinion, etc. (Tr. 15-16) quoted from one other case, *Shapiro v. United States,* 2 Cir., 166 F. 2nd 240, besides the *Kendig* case already mentioned. The Shapiro case was one of the numerous "wrong form" cases, i.e., the use of W.D., A.G.O. Form No. 41, designed for another use. It has been said that the courts have been unanimous in holding that where such forms were mistakenly used for designating a change in the beneficiary of an insurance policy it was an affirmative act and effective for that purpose.

In a recent decision it was pointed out that a reissue of this form in 1943 carried a warning note that it did not apply to insurance. Perhaps the word unanimous should not have been used. In *Coleman v. United States* (CCA Dist. Col.), 176 F2d 469, there was both a GO 41 form signed, contents not stated, and a Government Insurance Report form addressed to the wife of the officer in which he said "On date of Oct. 1, 1943 I took out $10,000 (National Service Life Insurance) (United States Government Insurance) naming you as my beneficiary. To cover the cost of this insurance I have authorized a monthly deduction from my pay of $6.50."

There was no proof that any change of insurance beneficiary form had ever been signed or asked for. The officer was killed in action overseas on March 23, 1944. The appellate court found that the trial court had set out a correct analysis of governing principles of law. Judgment for the mother, the original beneficiary, affirmed.

In the now somewhat discredited case of *Gann v. Meek* (CCA 5), 165 F2d 857, which the same court refused to follow in *Butler v. Butler,* 177 F2d 472, a letter written by a semi-illiterate corporal of Marines to a third party, his brother, to the effect that he had changed his insurance beneficiary was held sufficient to evidence such a change. The majority opinion indulged in considerable melodramatics to justify the decision. The mordant dissenting opinion of Judge Sibley, mentioned with approval by Judge Porterie in *Kell v. United States,* discussed hereinafter, seems to us very much in point. We quote the concluding paragraph on page 862:

> "Are we to invent rules of evidence applicable only to soldiers in time of war? Are we to imagine 'the maelstrom of carnage and death' on the Island of Saipan had anything to do with this matter, where it appears only that the soldier was on Saipan nine weeks later, and it does not appear where he was when he said he had changed his insurance? We carry romantics too far in doing so."

THE LATER CASES

In the course of preparation of this brief we have read the cases cited to the topic of Change of Beneficiary in the reissue of 38 U.S.C.A. In the main they are district court cases, blindly following precedent in the Circuit Courts with no great showing of careful reasoning. A notable exception is *Kell v. United States* (DC WD La.), 104 F. Supp. 699, affirmed with commendation for its statement of the principles of law in 202 F 2nd 143. It appears to us deserving of comment and quotation.

The facts show that the insured, a member of the crew of a destroyer, in a letter written to his wife from a home port fifteen days after marriage, said, "I had my insurance changed to your name." Four other letters were written within the next three months, the last eleven days before his death of December 18, 1944, when the ship was lost in a typhoon in the China Seas with only six survivors, but none mentioned insurance. The Veterans Administration paid installments of the insurance to his mother, the original beneficiary, until a demand was made by the wife based on the letter of September 30, 1944, first above referred to, when payments were suspended pending court action. We quote from page 703 of the district court opinion:

> "We have compared the facts of this case with the facts of all those cases cited to us and others found in our research. We believe that to permit the plaintiff in this case to prevail, under her facts, would be going out further than has ever been done before in those cases cited to and found by us.
>
> "We analyze and compare cases; this is a part of the science of jurisprudence. The question at issue here is when has there been and when has there not been a change of beneficiary. The only safe procedure for the court is not to lose itself in the analysis of cases; it should, once in a while, come back to the statute and the regulations thereunder — not to be led astray therefrom by the charityof expression by which

a Court may be moved in each case of this character.

". . . Seriously, what is the more to be condemned is that the Court is legislating when it leaves clear and unambiguous meaning of the statute and the regulations. Step by step, case by case, one gets further and further away from the statute and the regulations; until they are all but gone!

". . . We will sign a judgment consistent with the above in favor of Mrs. Davis and the United States, upon presentation."

Ford v. United States (DC ED Tenn.), 94 F. Supp. 223, was an involved case, the mother the first beneficiary, a change to the wife of record, and a claim by the mother of a second change to her. On page 224 the court says that the principal witness for the plaintiff was one King, a fellow (army) officer of the insured, who served with him in the European Theatre of Operations. He testified to an intimate acquaintanceship, that they at times bunked together, and that he had been treated by the insured as a confidant with respect to his married life, that the insured had told him he was unhappily married and intended to divorce his wife and change the beneficiary of his insurance from his wife to his mother. After returning from a mission shortly before the insured's death, the witness was told by him that he had changed the beneficiary. After commenting on the vagueness of this witness's testimony, which appeared to have become more definite when he was recalled on direct after a court recess, the opinion says, in language which seems to us applicable in a lesser degree to the deposition of the witness Baker in this case:

"The testimony of King is of more significance as negative than as positive testimony. Nothing was said indicating that King saw the insured sign any papers purporting to designate a change of beneficiary, or that he saw any such papers in the insured's possession, or that he accompanied the insured to any office or post for the purpose of obtaining or signing any papers relative to insurance. Nor is there anything in the testi-

mony as to what the insured did by way of affecting a change of beneficiary."

Judgment was in favor of the wife, the last beneficiary of record.

With the burden of proof upon the party claiming a change of beneficiary, as so often held by the courts, both the *Kell* and the *Ford* cases seem to us much stronger for such claimants than the instant case. Surely a written instrument, even a personal letter written by the insured to the claimant should carry more weight than her statement, as here, of what the insured told her.

In 2 ALR 2d, at page 500, in an annotation on the subject of change of beneficiary, §8, Letters to, or testimony of, substituted beneficiary, the following appears, which was set out as a footnote to the *Kell* case in the opinion previously mentioned:

> "The evidence which this writer would consider the weakest is the testimony of, or letters written to, the substituted beneficiary. The weakness of such evidence lies in the fact that the insured may, for some reason or other, see fit to indicate either in conversation with, or letters to, the person vitally interested in the change, that he had attempted to effect such change, although actually he never contemplated such a change. Obviously, such evidence lends itself also easily to fraud."

The oral testimony of the defendant on the trial seems to us especially vulnerable to this criticism. Since under the new rules pleadings are not required to be verified, she can scarcely be held responsible for what her counsel say in her answer, the further, separate and affirmative defense (Par. 2, Tr. 8) that "about two months after the marriage . . . . . the said Wallace Philip Gulley advised the defendant, his wife, that he had made a change of beneficiary," etc. Two months after the marriage would be on or about December 15, 1946. Now what was her testimony on the subject? In

effect, that there were two conversations and no more, and only in the second did he say that he had made such a change: (Tr. 56, 59)

> "Q. And after you married in 1946 did you have occasion to discuss insurance with you then husband?
>
> A. I did.
>
> Q. Would you state the circumstances, when and where this conversation occurred, who was present?
>
> A. It was at the time I changed the beneficiary on my own insurance policy from my mother to my husband, Wallace."

Following this, over objection by the writer, an insurance policy directly naming her husband as beneficiary was admitted in evidence as Defendant's Exhibit B, dated January 29, 1947, approximately three and a half months after the marriage. The direct examination continued:

> "Now with the policy now as our exhibit, does that refresh your memory of the conversation you had with your husband on or about that time?
>
> A. Yes, at that time he told me he was also *going to change* his insurance policy over to me as beneficiary." (Emphasis supplied.)

And four lines further down the same page (Tr. 59):

> "Q. Now subsequent to this time, did you have occasion to discuss insurance again with your husband?
>
> A. Yes, I did. It was several months later, approximately two months before his death. At that time I was working in the Bank of America and the husband of one of the girls I worked with was an insurance salesman and she told me about this 20-year endowment policy and I talked it over with my husband when we went out to dinner. We were taking a walk and I told him I was thinking about taking out this insurance policy and he said he thought we were paying enough premium for insurance and without

thinking I turned to him and said, 'Well, you don't have any insurance' and he turned to me and said, 'I do, I have ten thousand dollars in government insurance in your name'....."

Approximately two months before Wallace Philip Gulley's death would be some time in the month of June, 1947. Cf. the statement in the Baker deposition that the one conversation in which the decedent told Baker that he had had his insurance changed to his wife's name "was in June of '47." (Tr. 49) It looks as though there had been a synchronization of dates there.

Going back to her testimony, if her husband had told her on or about January 29, 1947 that he "was going" to change his insurance policy over to her as beneficiary, why, even without thinking, did she tell him perhaps four months later that he didn't have any insurance? Remembering always that she was a young woman of business training and experience, plus her normal woman's curiosity, would she not have followed up that earlier statement by asking him if he had made such a change, and perhaps how? Why should the subject have slipped her mind entirely in that comparatively short time?

Again as to Baker, if he recalled, even rather vaguely, (Tr. 52) at the time of giving his deposition, that the decedent had filled out a confidential statement in February, 1947, would he not have had the same recollection in mind on that bus trip back from the funeral in August, 1947, and if so, why did he not mention the existence of such a document to her then, and not leave it to be discovered by accident on October 13, 1947? One wonders when the defendant learned that Baker knew or purported to know something about her late husband's insurance, a personal matter, if not on that trip together. The record is utterly silent on that subject.

It has been suggested hereinabove that letters should carry more weight than statements of conversation. As to

how much weight they should carry the courts are not entirely in accord. In *Littlefield v. Littlefield* (CCA 10), 194 F. 2d 695, three letters from the insured to his parents, the first stating an intention to change the beneficiary from his wife to his children, the second that he had not changed the beneficiary but would do so that week, and the third, written from Belgium November 11, 1944, nine days before the insured was reported missing in action, later determined as killed, that on November 10, 1944 he had changed the beneficiary to his father "so that he can see the kids get their share," were held admissible for the purpose of showing an intent upon the part of the insured to change the beneficiary, but not admissible for the purpose of showing he had changed the beneficiary.

In *Watson v. United States* (CCA 5) 185 F. 2d 292, the case was a stronger one for the claimant wife than in the case before the Court. There was evidence by a witness, the insured's secretary, who claimed to have not only seen but to have prepared, seen signed by Dr. Watson and mailed to the Veterans Administration an application for change of beneficiary. She testified that applications for reinstatement of the insurance and for change of beneficiary had been prepared and signed, that she typed the wife's name in on the latter form and had mailed them. The policy was reinstated and in force at the time of the insured's death, but the files of the Veterans Administration, as here, disclosed no application for change of beneficiary, and her evidence was held in sufficient to support the burden of proof of such change. Decision below in favor of a sister, the original beneficiary, affirmed.

To us the instant case seems closely akin on point of facts, but weaker, in that there are no letters nor corroboration of the defendant's testimony, to that of *Ramsay v. United States,* (DC Fla.) 72 F. Supp. 613, cited in the annotation in 2 ALR 2d at page 501, from which we quote the language relative to the holding. There was testimony of the wife and her mother as to a statement by the insured that he had

changed his government insurance to name his wife as beneficiary, a letter from him to his wife stating that he did not know why she had not received the certificate of insurance, another letter to her referring to his insurance as payable in installments instead of a lump sum, and statements to brother officers that he had changed his insurance to his wife but did not know whether or not she would receive the insurance because the Veterans' Bureau apparently did not have his change of beneficiary properly recorded and that he had not received any answer or confirmation of the change from the Bureau. There were also photostatic copies of the official service records docket of the insured which showed that he had designated his wife as next of kin and as beneficiary for naval benefits accruing in case of death. We quote from page 501 of the annotation, second column:

> "Holding that the wife had failed to carry the burden of proof to show that the insured did everything in his power to effectuate the change in beneficiary, but that the evidence persuasively showed that the insured took no steps to change his beneficiary, the court said that the law will not permit to consider that done which should have been done and that the evidence showed too clearly that the insured could never bring himself to the point of changing the beneficiary of his insurance from his mother to his wife and that the insured would have had ample opportunity to effect such a change if he had desired or dared to do so. The court distinguished the cases of Roberts v. United States, ... 157 F. 2d 906 ..... and Collins v. United States, ... 161 F. 2d ..... on the ground that in those cases there was evidence that the insured actually executed a request to change the beneficiary."

In the instant case there were findings of oral statements by the insured not in accord with defendant's testimony of what he had said to her (Tr. 21, Findings 10 and 11).

> "10. That a few days after Mother's Day in May, 1947, decedent . . . stated in substance to his brother, Guy William Gulley, as follows:"

11. That decedent did state on or about Mother's Day in 1947, to his sister Virginia Barbee in substance as follows:"

The latter finding is especially positive. Not that there was testimony to that effect, but the decedent did so state. The Conclusions of Law there following are that the first conversation testified to by defendant constituted a first manifestation of the insured's intention to change beneficiaries (Tr. 22, No. 1) and that his filing, on February 5, 1947 of the Confidential Statement quoted was the affirmative action evidencing the right to change beneficiary. (Id., No. 2.) Presumptively this was the only affirmative action the trial court concluded was shown. Therefore, in the language of this Court in the Kendig case, supra, Judge Foley considered the confidential statement as "representing in and of itself an attempt to effect the change." To us he seems to have gone further than that, and held that it was in itself such a change. If so, paraphrasing the language of the Kell case, supra, he went out further than has ever been done before in those cases found by the writer hereof.

SUMMATION

We respectfully submit that the evidence below did not sustain Conclusion of Law No. 2 that the insured Wallace Phillip Gulley by filing the confidential statement therein referred to took affirmative action evidencing an exercise of his right to change the beneficiary of his insurance, or Conclusion of Law No. 3 that the defendants Mary Jane Gulley, then Mary Jane Wauson, and the United States of America were entitled to judgment. Hence the two judgments entered pursuant thereto, differing in some slight degree with reference to costs and attorney's fees, were erroneous and should be reversed.

ROBERT R. GILL,
Attorney for Appellant.